

First and foremost, this whole thing is a charade. That being said, I had written a passionate but genteel letter focused mostly on the importance of the rule of law, particularly with regards to moralless corporate Greed and the much needed consumer protections associated with such behavior as opposed to Chairman Pai's misguided ideological fetish with a near lawless race to the bottom. I used the word "innovation" multiple times, which has become mandatory for anything remotely related to technology today and as a result has become almost meaningless particularly when coming from competition deprived legacy institutions that "innovate" by merging or acquiring other companies to further limit rather than increase the motivation for actual innovation. Yet, after reading the article I have added below, which is clear and very much to the point, I believe I wasted my time writing that letter and perhaps I have wasted more time writing this brief replacement as well because I seriously doubt it will be read or considered in any way if it is. Nonetheless, this is the game Chairman Pai is playing and to be clear and to the point – Net Neutrality is working great as is and this absurd self-serving assault on it is precisely why laws and government in particular Need to exist in the first place – to provide All Americans equal legal Protection from those all too willing to abuse their positions of power.

Don't Get Fooled: The Plan Is To Kill Net Neutrality While Pretending It's Being Protected

from the *pay-attention* dept

Back in February, we had former top FCC staffer Gigi Sohn [on our podcast](#) and she laid out the likely strategy of Ajit Pai and Congress to kill net neutrality while pretending that they were protecting net neutrality. And so far, it's played out *exactly according to plan*. Each move, though, seems to be getting reported by most of the tech press as if it's some sort of surprise or unexpected move. It's not. There's a script and it's being followed almost exactly. So, as a reminder, let's go through the exact script:

Step 1: Set fire to old net neutrality rules

New FCC boss Ajit Pai [announces](#) that he's going releasing a plan to roll back the Open Internet rules that his predecessor, Tom Wheeler, put in place two years ago. This has been done, and Pai has released what's called an NPRM (a Notice of Proposed Rulemaking) which opens up a comment period. Once the comment period is over, the FCC can release its new rules and vote on them. The problem -- as basically everyone in telco knows (but which almost never gets mentioned in the press coverage) is that the FCC almost certainly [will lose in court](#) if it rolls back the rules that Wheeler put in place. **This is important.** Contrary to what you may have heard, the FCC isn't allowed to just willy nilly flip flop the rules.

Indeed, the FCC is barred [by statute](#) from putting in place "arbitrary and capricious" rule changes. Basically, every lawsuit challenging any FCC rulemaking includes claims that they were "arbitrary and capricious." And, to get over that burden, the FCC can't just change the rules willy nilly, but have to lay out clear evidence for why a change in policy is necessary. That's *why* the Wheeler Open Internet rules

have been [upheld](#) by the DC Circuit (who shot down previous rules). Wheeler effectively laid out the clear reasons why the market had changed drastically in the decade plus since the FCC had declared broadband to be an "information service" rather than a "telecommunications service" (under Title II).

For Pai to successfully roll back those rules, he'd need to show that there was some major change in the market since the rules were put in place less than two years ago. That's... almost certainly going to fail in court. Again, this is important: Pai can change the rules, but that rule change will almost definitely be shot down in court. While many are assuming that the Pai's new rules are a done deal, they are not. I mean, he's almost certainly going to ignore the public outcry about how rolling back these rules will harm the internet. And he's almost certainly going to continue to blatantly misrepresent reality and (falsely) claim that investment in broadband has dropped because of these rules (despite tons of [clear evidence](#) that he's wrong). And, then he will pass new rules. But those rules will be challenged and he will almost certainly lose in court, and the old rules would remain in place.

Again: basically everyone in the FCC (including Pai) and in Congress know this. The press not reporting on this is a shame.

Step 2: Congress to the "rescue"

Congressional net neutrality haters (e.g. those receiving massive campaign contributions from big broadband players...) are well aware that Pai's plans have no chance in court. Yet, they *want* there to be this kind of uproar over the plans. They want the public to freak out and to say that this is bad for the internet and all that. Because this will allow them to do two things. First, they will fundraise off of this. They will go to the big broadband providers and act wishy washy on their own stance about changing net neutrality rules, and will smile happily as the campaign contributions roll in. It's how the game is played.

The second thing they will do... is come to "the rescue" of net neutrality. That is, they will put forth a bill -- written with the help of broadband lobbyists -- that *on its face* pretends to protect net neutrality, but in reality absolutely guts net neutrality as well as the FCC's authority to enforce any kind of meaningful consumer protection. We've already seen this with a [plan from Senator Thune](#) and [this new bill from Senator Mike Lee](#).

Unfortunately, some reporters will [buy this argument](#) and pretend that these bills will "save net neutrality." The article at that link is correct that a change in administrations *can* lead an FCC to *try* to flip flop again on net neutrality, but totally ignores that any such attempt would totally flop in court as arbitrary and capricious, without actual evidence of a changed market. The article is also correct that Congress *should* fix this permanently, but misses two key factors: (1) Congress is way too beholden to broadband lobbyists to come up with anything that actually protects neutrality and (2) the plans presented so far are designed to kill net neutrality while *pretending* to "protect" it.

This latter point is why Verizon's General Counsel can [say with a straight face](#) that no one wants to kill net neutrality. Because he's going to be supporting Congress' plan that pretends to save it. That's because the Congressional plans do put in place a few bright line rules that seem important to net neutrality -- saying that it bars "paid prioritization," throttling and the like. The **problem** is that those

are last decade's net neutrality issues. The big broadband providers have already said they're fine with those kinds of rules *because they've found ways around them*.

Specifically, the big broadband providers are doing things like [deliberately overloading interconnect points](#) to force large companies like Netflix to pay not to be throttled. Or they're putting in place totally arbitrary and low data caps, and then offering to "zero rate" certain services, pretending that this is a "consumer friendly" move. Again, as we've said dozens of times, you're not a hero if you save people from a fire *that you set yourself*. And that's exactly what zero rating is. Access providers set low data caps themselves and then "save" their customers from having to pay for going over those caps... but, only if you use approved services (often ones owned by the access provider themselves).

And this is the problem. Under the existing Wheeler rules, the FCC was able to adjust and respond to efforts by the telcos to continue to abuse net neutrality and block the open internet, while pretending they were doing something else. The Congressional proposals for "net neutrality" actually take away that authority from the FCC. In other words, they are opening the floodgates for the big broadband access providers to screw over customers, by saying (1) you can't do the obviously bad stuff, but you can do the hidden bad stuff that's effectively creates the same problems and (2) the FCC can no longer stop you from doing this.

That's not a plan to save net neutrality or an open internet. It's a plan to bless the access providers' plans to start walling off the internet and getting to double and triple charge companies for offering services. This is a plan to put tollbooths on the internet, but in ways that are less obvious than people were first worried about.

Step 3: Leverage the Controversy

Meanwhile, everyone who wants to kill net neutrality *knows* what's going to happen here. They will use the fact that Pai's rules absolutely can't withstand scrutiny in the courts to step up and push for the Congressional "rescue." Even more likely: they'll say that we need Congress to step in to "prevent uncertainty" from the inevitable lawsuits. Believe it or not: they're happy that this will get tied up in courts for years, because that gives Congress extra cover to push through this pretend "compromise." You'll hear lots of tut-tutting about "uncertainty" that has to be stopped. But, like zero rating and the fact that it's not heroic if you rescue people from your own fire, the fire here is being set by Ajit Pai and big broadband's key supporters. They're setting this fire of rolling back Wheeler's rules *solely* to whine about the uncertainty that will be caused by their own unnecessary rule change... and then will say that "only Congress can settle this."

So, what does all this mean? It means people who are mad about this (as you should be) need to be direct in what they're talking about here. Don't pretend that Pai's rule change is the real problem. It's not. It's just a mechanism to get to new regulations from Congress that will cause real problems. Don't let anyone say that the Wheeler rules have harmed the internet or investment. They have not. Don't let anyone (especially supporters of killing net neutrality) launch into self-pitying cries about "uncertainty." Remind them that the uncertainty is coming from *them* and their supporters. And, most importantly, don't pretend that a bill from Congress pretending to "save" net neutrality will actually do

so, when it's quite obvious that the bills being offered will undermine our internet, help big broadband screw over users, and diminish competition.

<https://www.techdirt.com/blog/netneutrality/articles/20170502/17212137292/dont-get-fooled-plan-is-to-kill-net-neutrality-while-pretending-being-protected.shtml>